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21st Century Union Security: Will Legislatures Enter the Fray?

As the new millennium approaches, the calendar has been taking on added significance. There has been a semi-serious debate as to whether the 20th century ends at midnight December 31, 1999, or midnight, December 31, 2000 and a far more serious conundrum concerning the impact of the year 2000 on the computers which control our civilization.

In our field, some significant anniversaries are being marked in the century's last few years. The Taft-Hartley Act became eligible for AARP membership by turning 50 in 1997. Later this year the New Jersey Employer-Employee Relations Act will turn 30. But despite that milestone, believe me, PERC can still be trusted.

The year 2001 will mark a quarter century into the public sector agency shop odyssey, launched in 1976 by *Abood v. Detroit Board of Education***,** 431 *U.S*. 209. Since that decision, most, if not all, agency shop principles have been molded in state and federal courts and administrative agencies. Public sector agency shop took center stage in the 80's with the *Robinson* cases [*Robinson v. N.J.*, 741 *F*.2d 598 (3d Cir. 1984) and 806 *F*.2d 442 (3d Cir. 1986)] and *Boonton Bd. of Ed. v. Kramer*, 99 *N.J*. 523 (1985)] locally and *Chicago Teachers Union v. Hudson,* 475 *U.S*. 292 (1986)(*Hudson*) nationally. In the 90's some of these rules were imported into the private sector as the NLRB sought to accommodate *CWA v. Beck*, 487 *U.S*. 735 (1988)(Beck) which has transformed private sector union shops into agency shop arrangements. Even as the federal courts shape contemporary private sector

union security arrangements, Congress has been stirring to make some changes in laws governing union dues.

HR 1625 would enact the "Worker Protection Fairness Act" requiring unions to get written authorizations from members before spending any money on political expenditures or other non-bargaining costs. The House Education and the Workforce subcommittee on Employer-Employee Relations has held six hearings in the last two years on mandatory union dues, including two after the bill had already been reported out of committee. The same type of activity is stirring in statehouses, including California where a similar initiative will be placed before voters this June. Bills and/or initiatives are also being considered in Massachusetts, Oregon and Utah.

Some critics of the measures assert that they are unnecessary given court rulings which allow employees not to subsidize union political expenditures. Over the past year more cases than usual addressed union security issues. A review of them follows.

The Next Big Case

Miller v Airline Pilots Ass'n*, 108 *F*.3d 1415 (D.C. Cir. 1997), *cert*. granted 118 *S.Ct*. 554 (1997) argued March 23, *1998.

The Supreme Court recently heard oral argument on this case in which the D.C. Circuit held as follows:

1. Nonunion airline pilots who brought an action in federal district court under the Railway Labor Act challenging the union's calculation of agency shop fees were not required to submit first to arbitration since the nonunion pilots never agreed to have agency shop fee disputes resolved by arbitration. The court interprets *Hudson* as not requiring arbitration *per se*, just a reasonably prompt decision by an impartial decisionmaker. It holds that federal district court litigation may satisfy *Hudson's* impartial decisionmaker mandate if proceedings move quickly.

2. Costs incurred by the union in contacting government agencies regarding its views on federal regulation of airline safety issues should be treated as nonchargeable. The case also addresses other issues pertaining to adequacy of information given in advance of collection of agency shop fees and the methods used to verify the accuracy of such information.

Public Sector

***Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 *F*.3d 807 (9th Cir. 1997).**

In a case addressing some of the same issues as *Miller*, the federal appeals court holds that nonunion teachers were not required to exhaust an arbitration procedure, used by Alaska teachers' associations, before commencing a federal court challenge to agency fees and the procedures used to collect them since they had not agreed to do so. The court holds that the Associations' refund of fees did not moot challenges to fee procedures as a court would still be able to provide relief to petitioners. [*Contrast Daly v. High Bridge Teachers' Ass'n*, 242 *N.J. Super*. 12 (App. Div. 1990), certif. den. 122 *N.J*. 356 (1990)]. The court also assesses whether the notice used complied with *Hudson* and holds that the district court should not have determined the chargeability of litigation expenses based on the notice alone. Addressing the responsibilities of public employers, the court holds that the districts had no obligation to check the adequacy of the *Hudson* notice. But it declines to rule on the validity of an indemnification clause because the issue was not properly raised. *But see Tierney v. City of Toledo*, 824 *F*.2d 1497, 1505-1506 (6th Cir. 1987).

***Ford et al. v. Madison-Grant Teachers Ass'n*, 675 *N.E.*2d 734 (Ct. Apps. Ind. 1997).**

The Indiana court holds that the first amendment rights of nonmember teachers were violated by a contract requiring them to pay a fair share fee equal to regular membership dues even though the teachers had never paid the fee. The court holds that the union failed to prove that its fee and collection procedures were adequate to safeguard nonmembers' first amendment rights. It directs that improper language in the collective bargaining agreement be expunged, but that the union would still have the right to collect a properly calculated fair share fee.

***Anderson v. Yorktown Classroom Teachers*, 676 *N.E.*2d 40 (Ind. Ct. Apps. 1997).**

This state court rules that the majority representative adequately proved before a AAA-selected arbitrator

that it made a proper allocation of its expenditures which formed the basis of the agency shop fee it charged to nonmembers. Affidavits of local and international affiliate's financial managers and auditors were held to be appropriate evidence on which an arbitrator could rely.

***Anderson v. East Allen Education Ass'n*, 683 *N.E.*2d 1355, (Ind. Ct. Apps. 1997).**

The appellate court overturns a lower court grant of summary judgment which required nonunion teachers to pay a fair share fee. Applying *Ford v. Madison Grant* , the court holds that the contract in the East Allen district is virtually indistinguishable from that in *Ford v. Madison Grant* and directs a remand to void the order requiring the teachers to pay the fee.

***Otto v. Pennsylvania State Education Ass'n--NEA*, 950 *F.Supp*. 649 (M.D. Pa. 1997).**

The federal district court holds that nonunion employees who fail to use the union's arbitration procedures to review amounts assessed as an agency fee lack standing to assert that the procedure did not provide for a reasonably prompt decision as required by *Hudson.* It dismisses that aspect of their claim. However, it allows the nonunion employees to litigate claims that agency shop fees improperly included amounts unrelated to collective bargaining and contract administration, finding the issue is unaffected by their failure to the use the arbitration procedure.

***Sheridan v. IBEW Local 455,* 940 *F.Supp.* 368 (D. Mass. 1996).**

The federal district court holds that a Massachusetts public power company has a sufficient nexus with the state so that nonmembers' rights not to finance political activities of the union were protected by the U.S. Constitution's first amendment. Holding that a nonmember is not required to specify his objections to a fee, the union is found to have failed to properly address the employee's objections to the amount of the fee and inform him of his right to challenge the fee before an impartial decisionmaker. The union also failed to establish a procedure for such challenges. A listing of expenditures which the union considered nonchargeable was held

insufficient, but a full audit of expenditures was not deemed required.

***Lucid v. Brown*, ___ *F.Supp*. ___, 156 *LRRM* 2070 (N.D. Cal., 1997).**

The court holds that use of two year old financial data did not prejudice the ability of nonunion employees to mount a fee challenge, but the union's failure to provide the information prior to fees being deducted by the City violated the nonmembers' rights. The Court also holds that a delay of ten to eleven months in permitting nonunion employees to challenge the fee is unreasonable and does not meet the reasonably prompt determination requirement of *Hudson*. The Court also holds that the city joined in the union's constitutional violation of nonmember rights when it withheld an agency fee from nonunion employees' paychecks before the union provided a financial statement and a schedule of chargeable and nonchargeable expenses even though the city made a good faith effort to comply with *Hudson*. The city's failure to provide procedures which minimize impingement of nonunion employees' rights and which facilitate employees' ability to protect their rights was found to give rise to municipal liability. The Court also holds that the indemnification agreement in the contract between the city and union is invalid as against public policy. The City was enjoined from collecting agency fee checks until further order of the court after the union had adopted a constitutionally valid procedure for collecting fees and for considering challenges to agency fees.

Private Sector

***Machinists v. NLRB (California Saw and Knife Works)*, _ *F.*3d _ , 157 *LRRM* 2287 (7th Cir 1998).**

Reviewing the case in which the NLRB announced it would apply the duty of fair representation standards to cases involving *Beck* issues, a seventh circuit panel, headed by Chief Judge Posner, a frequent author of agency shop opinions, enforces an NLRB order. The court holds that unions should be allowed to "pool" expenses despite claim that nonmembers would be subsidizing the costs of other bargaining units, that notice of workers' *Beck* rights in monthly newsletters (taking up one-half page in 8-page

publication) was adequate; and that the union could not limit withdrawals from membership to a January window period, despite the claim that processing withdrawals at other times would burden the union. The same court seemed to reach a contrary result in *Nielsen v. Machinists*, 94 *F*.3d 1107 (7th Cir. 1996), but Judge Posner distinguishes the holding because an NLRB order was not involved in *Nielsen*. A concurring opinion would apply *Nielsen* and reverse the NLRB.

***Wegscheid v. UAW Local 2911*, 117 *F*.3d 986 (7th Cir. 1997).**

The appeals court holds that federal courts have jurisdiction over duty of fair representation lawsuits filed by nonunion members which assert that they were misled about their right to pay agency fees rather than full dues and that language in the collective bargaining agreement describing employees' dues obligations was invalid on its face. NLRB jurisdiction to determine the facial validity of a union shop clause is found not to be exclusive. The Court noted that bifurcating the issues would require a nonunion employee to proceed in two different forums in order to obtain full relief concerning alleged violations of the duty of fair representation.

***Buzenius v. NLRB*, 124 *F*.3d 788 (6th Cir. 1997).**

In another case challenging the facial validity of traditional union security language in a private sector collective bargaining agreement, the circuit court reviews an NLRB decision which found that the union violated the act by failing to give effect to the petitioner's resignation from the union, failing to inform the petitioner and other company employees of their rights simply to pay financial core membership, and by using the petitioner's full union membership fees. The Board refused to hold that the language in the collective bargaining agreement requiring that all new employees become members of the union in good standing, without defining good standing or advising employees of their right not to be union members, constituted a facially invalid union security agreement. The petitioner appealed from that part of the Board's order which did not require expungement of the union security language.

Only the petitioner appealed and the appeals court reversed holding that the language must be expunged. In discussing similar cases, the Court noted that the Supreme Court had never passed on the issue of what constituted a facially invalid union security clause in a private sector agreement given the decisions in *NLRB v. General Motors,* 373 *U.S. 734 (1963)* and *Beck* holding that a person who did not wish to join the union could not be obligated to pay anything more than financial core membership which supports only the representational activities of the union.

***Marquez v. Screen Actors Guild*, 124 *F*.3d 1034 (9th Cir. 1997).**

Ruling a week before *Buzenius*, the 9th Circuit refuses to find that a clause requiring "membership in good standing" is misleading given that a union can require that an employee pay only financial core membership dues related to representational obligations. A part-time actress was told she couldn't work in a TV series ("Medicine Ball") absent prepayment of full dues. The district court on remand was to consider whether or not that requirement, coupled with the language in the collective bargaining agreement, violated the union's duty of fair representation. The appeals court declines to hold the producer of the series liable for any violations where no claim is made that the producer had an affirmative duty to inform the actress of her rights under union security clause.

***Ferriso v NLRB*, 125 *F*.3d 865 (D.C. Cir. 1997).**

The district court reviews an NLRB decision in which the union at the petitioner's request reduced his agency fees to exclude expenditures not related to its representational obligations, but failed to provide him with any information breaking down the union's expenditures. The board found that the union was required to provide the petitioner with data on their major categories of expenditure but refused to find that an independent audit of those figures was required. The petitioner appealed to the circuit court. The circuit court, relying on *Hudson,* found that the board erred in not requiring an independent audit of the union's expenditures and took pains to set forth guidelines on what was required, including meticulously defining the terms

"independent" and "auditor." Some of the data ultimately provided by the union were checked by union employees who had accounting backgrounds but were found not to be either independent or auditors. *See also Teamsters Local 443*, 324 NLRB __ (No. 105), 156 *LRRM* 1129 (1997).

***Williams v. NLRB*, 105 *F.* 3d 787 (2d Cir. 1996).**

The court holds that a union was within its rights to continue to collect membership dues by payroll deductions even after an employee resigned from the union. An annual ten-day window period during which an employee's resignation becomes effective was held sufficient to accommodate resignation requests and was held not to violate the act.

***Gunter v. Atomic Projects and Product Workers*, 970 *F.Supp*. 871 (D.N.M. 1997)**.

A U.S. District Court entertains a breach of the duty of fair representation suit filed against the union by agency fee payers who also joined the employer as a defendant. The court measures the adequacy of the union's statements and financial information to employees under the *Hudson* standards. The court declines to rule on the obligation to use arbitration to challenge the union's calculations since no employee had chosen to use the arbitration procedure. The court holds that because some employees are represented by different locals and thus pay different amounts based on the nonchargeable activities of each local, such disparity does not constitute discrimination with respect to payment of the fee holding that there is no requirement that all agency shop members pay precisely the same amount of dues. It also rules that the discharge of four employees for nonpayment of agency fees did not breach the duty of fair representation. It finds that the employer incurs no liability if it discharges such employees in accordance with its contract with the union absent independent knowledge that the union is seeking the discharge for an improper purpose. The private employer is found not to be liable for any misuse of agency fees to support nonchargeable activities.